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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Deanna Keith,
10 Plaintiff,

No. CV-13-01892-PHX-JAT

ORDER

11 v.

12 Carolyn W. Colvin,
13 Defendant.
14

15 Pending before the Court is Plaintiff's Motion for Order to Show Cause Why
16 Defendant Should Not be Held in Contempt for the Willful Refusal to Comply with a
17 Stipulated Court Order, (Doc. 25), and Defendant's unopposed Motion for Leave to File
18 Sur-Reply, (Doc. 29). The Court now rules on the motions.

19 **I. Background**

20 The issue presented in Plaintiff's motion derives from the alleged failure of
21 Defendant to comply with the Court's June 26, 2014 Order (the "Remand Order") that
22 remanded this matter to an administrative law judge ("ALJ") for further proceedings. *See*
23 (Doc. 18). The Remand Order expressly required the ALJ to "(1) hold a new hearing and
24 give Plaintiff the opportunity to question Dr. Levison and Dr. Allison; (2) appropriately
25 decline to give any weight to the June 2008 report of Dr. Prieve; and (3) as necessary,
26 proceed with the sequential evaluation process." (*Id.* at 1). On September 9, 2015, the
27 parties appeared before the ALJ for supplemental proceedings. (Doc. 25 at 3). At this
28 hearing, the ALJ did not call Dr. Levison or Dr. Allison to testify and stated that the two

1 doctors “would not [be] allow[ed]” to attend the hearing. (Doc. 25-1 at 6). Soon
2 thereafter, Plaintiff filed her motion to show cause. (Doc. 25).

3 Defendant responded by warranting that it would immediately schedule another
4 hearing where the ALJ would call the two doctors to testify. (Doc. 26 at 1–2). The only
5 sentence Defendant devoted to explaining the ALJ’s actions is the following footnote:
6 “[t]he ALJ apparently felt that the case could be fairly adjudicated without [the]
7 testimony [of Dr. Levison and Dr. Allison], but subsequent discussions have clarified the
8 need to follow the court’s order to the letter.” (*Id.* at 2). That same day, Plaintiff filed a
9 reply to acknowledge that Defendant was attempting to comply with the Remand Order
10 but insisted that her motion be held in abeyance until after the hearing. (Doc. 27).

11 On March 21, 2016, Plaintiff filed a “Sur-Reply: Status Report on Order to Show
12 Cause Request” to notify the Court that although the ALJ held another hearing on
13 December 4, 2015, Dr. Levison appeared telephonically and was unprepared to testify.
14 (Doc. 28 at 1). Particularly, Plaintiff asserts that Dr. Levison did not have Plaintiff’s
15 medical records before him, nor did he remember what he had written in his original
16 report. (*Id.* at 2). Apparently, Dr. Levison also testified that he had not been given the
17 relevant medical exhibits to review before the date of the hearing. (*Id.*)

18 On March 31, 2016, Defendant moved for leave to file a sur-reply, which Plaintiff
19 did not oppose. (Doc. 29).¹ The lodged sur-reply explains that Defendant subpoenaed Dr.
20 Levison to appear at the December 4, 2015 hearing and to bring all relevant materials
21 with him. The subpoena, dated November 9, 2015, states as follows:

22 You are hereby required to appear and testify in the above case at a
23 hearing to be held by Paula Fow, an Administrative Law Judge of the
24 Office of Disability Adjudication and Review. The hearing will be held on
25 the Fourth day of December at 9:00 AM Mountain (ARIZONA) (MSTA)
o’clock in Room E of the ADAR Phoenix 5 Building, at 3737 N. 7th Street,
Phoenix, AZ 85014.

26 You are further required to bring with you and produce at said

27
28 ¹ Because Plaintiff did not oppose Defendant’s motion for leave and for good
cause appearing the Court will grant Defendant’s motion.

1 hearing the following books, correspondence, papers, records or other
2 documents: and any other evidence in your possession relating to the above
3 matter.

4 Telephonic testimony is acceptable.

5 Defendant argues that it complied with the portion of the Remand Order obligating
6 it to make Dr. Levison available for further questioning because it subpoenaed the doctor
7 to testify and ordered him to bring all relevant documents to the hearing. In Defendant's
8 view, whether Dr. Levison was ill-prepared for the December 4, 2015 hearing concerns
9 the weight of his testimony, not Defendant's compliance with the Remand Order.

10 **II. Analysis**

11 The Court agrees with Defendant that the adequacy of Dr. Levison's testimony
12 should be weighed by the ALJ in her disability determination, not by the Court via a
13 motion challenging Defendant's compliance with the Remand Order. Defendant
14 complied with the section of the Remand Order requiring the ALJ to "hold a new hearing
15 and give Plaintiff the opportunity to question Dr. Levison and Dr. Allison" when it
16 (1) subpoenaed Dr. Levison to appear at and bring all relevant materials to the December
17 4, 2015 hearing and (2) conducted the hearing.² Whether Dr. Levison sufficiently
18 prepared for the hearing speaks not to Defendant's compliance with the Remand Order
19 but to the weight of Dr. Levison's testimony, which is an issue not presently before the
20 Court. *See Balla v. Idaho State Bd. of Corrs.*, 869 F.2d 461, 465 (9th Cir. 1989) ("[I]t is
21 well settled that 'a contempt proceeding does not open to reconsideration the legal or
22 factual basis of the order alleged to have been disobeyed and thus become a retrial of the
23 original controversy.'" (quoting *United States v. Rylander*, 460 U.S. 752, 756 (1983))).

24 Furthermore, to the extent Plaintiff complains that the ALJ violated the Remand
25 Order by permitting Dr. Levison to testify telephonically, Plaintiff has not shown that the
26 ALJ violated Social Security Administration ("SSA") Regulations by doing so. There is
27 nothing in the Remand Order requiring Dr. Levison to appear in person, and SSA
28 Regulations expressly permit a medical expert witness to testify by telephone. *See* 20

² Plaintiff does not allege any issues with her ability to re-question Dr. Allison.

1 C.F.R. §§ 404.950(e) (2013), 404.936(c)(2) (2014). Here, the ALJ has not issued her final
 2 disability decision, and nothing in the record suggests that the ALJ failed to follow the
 3 SSA Regulations. Accordingly, this issue is not properly before the Court at this time.³

4 Consequently, the Court will deny Plaintiff's motion for order to show cause.

5 **III. Conclusion**

6 For the foregoing reasons,

7 **IT IS ORDERED** that Defendant's Motion for Leave to File Sur-Reply (Doc. 29)
 8 is **GRANTED**.

9 **IT IS FURTHER ORDERED** that the Clerk of Court shall file Defendant's sur-
 10 reply that is currently lodged at Docket No. 30.

11 **IT IS FINALLY ORDERED** that Plaintiff's Motion for Order to Show Cause
 12 Why Defendant Should Not be Held in Contempt for the Willful Refusal to Comply with
 13 a Stipulated Court Order, (Doc. 25), is **DENIED**.

14 Dated this 15th day of June, 2016.

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 18 James A. Teilborg
 19 Senior United States District Judge
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21 ³ Although SSA Regulations permit medical experts to testify by telephone, *see*
 22 § 404.936(c)(2), the ALJ was required to give Plaintiff notice that Dr. Levison would do
 23 so, *see id.* § 404.938(b) (2014). Plaintiff stated that she objected to the telephonic
 24 testimony at the December 4, 2015 hearing but did not express whether she received
 25 proper notice before the hearing. (Doc. 28 at 2). Based on the record before it, the Court
 26 cannot find that the ALJ violated the Remand Order by allowing Dr. Levison to testify by
 27 telephone. The Court notes, however, that its decision is without prejudice to Plaintiff
 28 seeking the relief she believes to be appropriate after the ALJ renders her disability
 decision. *See Cooley v. Colvin*, 2015 WL 1518096, at *21 (D.S.C. Mar. 31, 2015)
 (finding that an ALJ's heavy reliance on a medical expert who did not review all of the
 evidence was a "significant reason" for the ALJ to require in-person testimony). At this
 time, however, deciding whether the ALJ's decision to overrule Plaintiff's objection was
 justified is premature as the ALJ has yet to issue a disability ruling.